# TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1941

No. 309

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1900.

## No. 238.

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THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

STEPHEN TALTY.

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APPEAL FROM THE COURT OF CLAIMS.

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1 Court of Claims.

STEPHEN TALTY
*v.*
THE DISTRICT OF COLUMBIA. } No. 335.

I.—*Petition and amended petition.*

On the 15th day of December, 1880, the claimant filed his original petition.

On the 11th day of February, 1882, the defendant filed a traverse to said original petition.

The original petition was taken from the files of the court by the referee and, by reason of his death, has never been returned, and can not now be found.

On the 28th day of July, 1897, the claimant by leave of court filed his amended petition, which is as follows:

2 In the Court of Claims.

STEPHEN TALTY
*v.*
THE DISTRICT OF COLUMBIA. } No. 335.

*Amended petition.*—Filed July 28, 1897.

*To the honorable judges of the Court of Claims:*

Your petitioner respectfully represents:

I.

That on the 7th day of August, A. D. 1873, Henry D. Cooke, Alexander R. Shepard, James A. Magruder, Adolph Cluss and Henry A. Willard, composing the board of public works of the District of Columbia, entered into a written contract with claimant, No. 826, for the improvement of M street northeast, between North Capitol and Boundary streets northeast, which contract was extended by the Commissioners of the District of Columbia, on the 17th day of September, A. D. 1875, to embrace the grading, setting curbs, and laying brick pavements on K street, between 3rd and 7th northeast. And on the 3rd day of December, A. D. 1875, said Commissioners extended said contract to embrace the laying of flag footwalks, cobblestone gutters, and gravel the roadways on K street, between 3rd and 7th streets northeast, by the terms of which he was to receive the prices established and paid by the board of public works for work of a similar character.

(See contract No. 826 and the two extensions filed by the Commissioners of the District of Columbia.)

II.

That claimant performed to the satisfaction and acceptance of the District of Columbia all the work ordered by the District embraced in said contracts and extensions, and said work was duly measured and
3 certified by the engineers of the District of Columbia.

III.

That the work done by claimant, and accepted and audited under the original contract, No. 826, amounted to the sum of ..... $49,323.54
That there has been paid thereon ..... 49,033.91

Leaving due and unpaid ..... 289.63

which became due and payable January 15, 1876.

(See measurement returned by the Commissioners of the District of Columbia.)

IV.

That under the provisions of the new contracts, called extensions, the claimant performed a large amount of work on K street, between 3rd and 7th northeast, which was duly accepted by the District of Columbia and certified measurements issued at the written contract rates, one measurement for $10,504.60, which was audited by the board of audit, and one measurement for $2,570.30. This last measurement was not audited by the board of audit, not having reached said board of audit prior to the abolition of said board, and the said measurements, amounting to the sum of $13,074.90, remain due and unpaid, less the sum of $9,184.45 paid on account thereof in partial measurements, leaving a balance due on the work done under the extensions of said contract the sum of $3,890.45, due and payable March 18, 1876.

(See measurement of March 18, 1876. Returned by Commissioners of the District of Columbia.)

V.

The claimant therefore demands judgment against the District of Columbia in the sum of four thousand one hundred and eighty dollars and eight cents ($4,180.08), as a debt against the District of Columbia, due and payable as follows: $289.63, January 15, 1876, and $3,890.45, March 18, 1876, and such other sums as your petitioner shall
4 prove to be due to him from the District of Columbia, but which your petitioner can not at present specifically state, for want of records not in his possession.

STEPHEN TALTY.

V. B. EDWARDS,
*Attorney for claimant.*

DISTRICT OF COLUMBIA, SCT.:

Stephen Talty personally appeared before me, and made oath according to law, that no transfer or assignment of said claim has been made by your affiant; that he has read the foregoing petition, and knows the contents thereof, and that the matters therein set forth upon his own knowledge are true, and those upon information he believes to be true.

STEPHEN TALTY.

Subscribed and sworn to before me this 24th day of July, A. D. 1897.

[SEAL.] LEWIS I. O'NEAL, *Notary Public.*

(Indorsed:) D. C., No. 335. Stephen Talty *v.* The District of Columbia. Amended petition. Copy. Filed July 28, 1897. J. R. V. B. Edwards, atty.

5 II.—*Orders of reference.*

On the 22d day of June, 1897, on motion of claimant, defendant consenting, it was ordered that the case of Stephen Talty vs. District of Columbia, No. 335, be referred to Frank W. Hackett, esq., as referee under the act of Congress approved June 16, 1880, to take and state the account between the claimant and defendant.

BY THE COURT.

On the first day of March, 1898, on motion of the defendant this case was referred to said Frank W. Hackett, esq., as referee.

BY THE COURT.

6 III.—*Order for entry of judgment and as to findings of fact.*

STEPHEN TALTY
*v.*
THE DISTRICT OF COLUMBIA. } D. C., 335.

This case coming on to be heard on the twenty-third day of January, 1899, upon the reports of the referee, Frank W. Hackett, esq., bearing date October nineteenth, 1897, and April twenty-third, 1898, and on the proofs and evidence taken in the case:

It is ordered that the said reports of the referee stand and be confirmed and that the claimant have and recover in the manner provided by the act of June 16, 1880, chapter 243, the sum of four thousand one hundred and eighty dollars and forty-four cents ($4,180.44) against the defendant upon debts of the District of Columbia due and payable on the 18th day of March, 1876, within the meaning of the sixth section of said act.

And it is further ordered that the before-mentioned reports of said referee stand as the findings of fact of the court in this case, and that the conclusion of law thereon is that the claimant should cover as above set forth.

BY THE COURT.

Filed February 20, 1899.

7 IV.—*Reports of Frank W. Hackett, esq., as referee.*

Court of Claims.

STEPHEN TALTY
*v.*
THE DISTRICT OF COLUMBIA. } No. 335, D. C.

*Report of referee.*—Filed Oct. 19, 1897.

*To the honorable court:*

The undersigned referee in the above-entitled cause reports as follows:

On application of the claimant he caused the claimant to appear before him and took his deposition, which has been filed. The claim is for balances due for work done by the claimant under a contract for improving the streets of the city. It is made up of two items, one of $289.63

retained by the District officials for the purpose of making repairs that should become necessary for the fulfillment of the contract, and the other item an amount based upon changes in the measurements. The testimony consists of the official reports of the District and of the deposition of the claimant. I am satisfied that the sum of $289.63 is due to the claimant, being the amount retained under the original contract, No. 826, January 15, 1876. The claimant testifies that no complaint was made of his work and no application of any part of this money to repairs. I think that he is entitled to recover this item.

Under the extensions of his contract the claimant performed work on K street, between Third and Seventh northeast. This work was accepted by the District and certified measurements issued. One measurement resulted in the sum of $10,504.60. This was audited by the board of audit. Another resulted in $2,570.30, but it did not reach the board of audit prior to the date of the abolition of the board.

It appears, therefore, that a total of $13,074.90 was due to the claimant. From this should be taken the sum of $9,184.09, which has been paid him on account. There remains the sum of $3,890.81 due him from March 18, 1876. As a result I find that the claimant's demand for these two sums, amounting to $4,180.44, is proved, and therefore respectfully report that there is due the claimant the said sum of $4,180.44 from the District of Columbia, and that he is entitled, in my opinion, to judgment for that amount.

FRANK W. HACKETT, *Referee.*

OCTOBER 19, 1897.

(Indorsed:) D. C., 335. Stephen Talty v. The District of Columbia. Report of referee, Frank W. Hackett. Filed Oct. 19, 1897. Court of Claims.

8 Court of Claims.

STEPHEN TALTY
*v.*
THE DISTRICT OF COLUMBIA. } No. 335.

*Additional report of referee.*—Filed April 23, 1898.

*To the honorable court:*

The undersigned referee respectfully reports as follows:

Having made a report 19th October, 1897, finding in favor of the claimant in the sum of $4,180.44, the action of the court upon the report was, by order of March 1, 1898, suspended until the coming in of an additional report from the referee.

This additional report intends that the referee shall state an account, together with the evidence taken by the referee, for the information of the court.

Objection having been made by the counsel for the District that the papers on file were insufficient to substantiate a finding in favor of the claimant, the claimant adduces as a witness on his behalf David E. McComb, a civil engineer in the employ of the District. The deposition of this witness taken March 24, 1898, is returned with the report.

The witness identifies paper filed July 2, 1897, marked number one in red ink, as the original sheets of measurements taken from the field book of the engineer measuring the work. It indicates the measurements and quantity of material in tabulated form. The witness also identifies the memorandum attached to the first of such sheets in the handwriting of Mr. Oertley, computing engineer in the employ of the Commissioners in 1885.

It was agreed at the hearing that the papers heretofore filed in this case have disappeared. Search in the office of the attorney for the District, and at the house of Mr. Donovan, former referee, has failed to discover anything of these papers. It is not charged that their disappearance is due to any fault of the claimant.

In these circumstances the referee is satisfied to rely upon the memoranda in the sheets just referred to.

Paper number two (in red ink), filed July 2nd, 1897, being a copy from the account of Stephen Talty with the District, contains an item of property charged against the contractor amounting to $2,992.05. This is written in lead pencil, it appearing that the same figures are written in lead pencil in the original book in the possession of the District. As this is a charge made by the District against the claimant for property furnished him in the performance of the contract, the referee charges the same against the amount that appears due to the claimant.

Repeating to some extent what has already been stated in the report, it may be said that the reports in this cause are for work done and materials furnished under a written contract numbered 826, dated August 7th, 1873, entered into between the board of public works of the District of Columbia and Stephen Talty. Two extensions of this contract were entered into between the Commissioners of the District, successors to said board, and the said Talty, which extensions are dated respectively September 17, 1875, and December 3, 1875.

In stating the account between the claimant and the District the referee relies upon items of charge and receipt set forth in the papers already referred to, filed in this cause by the District in response to the call for the same by the claimant.

9 [File No. 3, filed August 19, 1897, Doc. No. 335.]

Contract 826 is in the following language and figures, to wit:

This contract, made and concluded this seventh day of August, in the year one thousand eight hundred and seventy-three (1873), by and between Henry D. Cooke, Alexander R. Shepherd, James A. McGruder, Adolph Cluss, and Henry S. Willard, constituting and composing the board of public works of the District of Columbia, of the first part, and Stephen Talty, of Washington, D. C., of the second part, witnesseth:

First. That the said party of the second part has agreed, and by these presents doth agree with the said party of the first part, for the consideration hereinafter mentioned and contained, and under a penalty expressed in a bond bearing even date with these presents, and hereunto annexed, to furnish at his own proper cost and expense all the necessary materials and labor, and, in a good, firm, and substantial manner, to grade, set the curbstones, lay and put down cobblestone pavement in gutters, and lay

and put down the brick foot pavement on M street NE., between North Capitol and Boundary streets NE., in the city of Washington, D. C.

Also, to gravel the carriage way of said M street NE., between said North Capitol and Boundary streets NE., in the city of Washington, D. C.

The work of said grading, curbing, brick paving, and graveling to be done and completed in accordance with the specifications, to wit:

Tenth. It is further agreed that the said party of the second part shall receive the following prices as full compensation for furnishing all the materials and labor which may be required in the prosecution of the whole of the work to be done under this agreement, and in all respects completing the same, to wit:

Grading, thirty (30) cents for each and every cubic yard of earth, sand, or gravel excavated and hauled a distance not exceeding two hundred (200) feet, and one and one-quarter (1¼) cents per cubic yard for every additional one hundred (100) feet of haul beyond the first two hundred (200) feet.

Graveling, per square yard, fifteen (15) cents.

Laying brick foot pavement (new), per square yard, one hundred (100) cents.

Relaying brick foot pavement (old), per square yard, twenty-five (25) cents.

Setting curbstones, 8 in., new, per lineal foot, forty (40) cents.

Setting curbstones, 6 in., new, per lineal foot, thirty (30) cents.

Setting curbstones, 5 in., new, per lineal foot, twenty-five (25) cents.

Resetting curbstones, 4 in., old, per lineal foot, fifteen (15) cents.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

HENRY D. COOK, [L. S.]
ALEX. R. SHEPHERD, [L. S.]
JAMES A. MCGRUDER, [L. S.]
ADOLPH CLUSS, [L. S.]
H. A. WILLARD, [L. S.]
*Board of Public Works of the District of Columbia.*

STEPHEN TALTY, [L. S.]
*Contractor.*

Signed and sealed in the of .
W. E. NOTT.
GEO. T. HOWARD.
JOHN A. HURLEY.

The account of this contract is stated as follows (see File No. 2, filed July 2, 1897, and Lieutenant Hoxie's report):

*The District of Columbia to Stephen Talty, Dr., for work done and materials furnished on M street NE.*

| | |
|---|---|
| Lowering water main | $1, 100. 00 |
| Surface work | 48, 223. 54 |
| | 49, 323. 54 |

| | | |
|---|---|---|
| Credit by certificates | $44,345.51 | |
| Credit by property | 4,688.40 | |
| | | $49,033.91 |
| Balance due January 15, 1876 | | 289.63 |

10 File No. 1, filed Aug. 19, 1897, Doc. 335, is the first extension of said contract and is in the following language and figures, to wit:

September 17, 1875. File 2544, E. O., 1875.
File 6841, E. O., 1875.

Extension of contract No. 826.

For and in consideration of the stipulation hereinafter contained it is agreed by and between the Commissioners of the District of Columbia and Stephen Talty that contract No. 826, in the series of contracts made by the board of public works of the District of Columbia, be, and is hereby, extended, with its various terms, conditions, and stipulations, to embrace the following work, to wit:

Set the curbs and lay the brick foot walks on K street north from 3rd to 7th street east, all old material suitable for the purpose to be relaid. Also do the necessary grading on said street between said points.

It is further agreed that the work herein specified shall be completed by the first of November, 1875, under penalty of forfeiture of all right and title to perform said work.

It is further agreed that the said Stephen Talty shall receive the prices established and paid by the board of public works for work of similar character: *Provided*, That payment be made in the bonds issued by the sinking-fund commissioners of the District of Columbia under and by virtue of section of the act of Congress approved June 7, 1874, which bonds shall be accepted and received at their par value.

In witness whereof the Commissioners of the District of Columbia, successors to the late board of public works, appointed under the act of Congress entitled "An act for the government of the District of Columbia, and for other purposes," approved June 20, 1874, and the parties of the second part to these presents have hereunto set their hands and seals this 17th day of September, 1875.

W. DENNISON, [L. S.]
J. H. KETCHAM, [L. S.]
S. L. PHELPS, [L. S.]
*Commissioners of the District of Columbia.*

STEPHEN TALTY, [L. S.]
*Contractor.*

Signed and sealed in the presence of—
WM. A. BROWN.

File No. 2, filed August 19, 1897, Doc. No. 335, is the second extension of contract 826 and is in the language and figures, to wit:

December 3, 1875. File 10097, E. O., 1875.

Extension contract No. 826.

For and in consideration of the stipulations hereinafter contained it is agreed by and between the Commissioners of the District of Columbia

and Stephen Talty that contract No. 826, in the series of contracts made by the board of public works of the District of Columbia, be, and is hereby, extended, with its various terms, conditions, and stipulations, to include the following work, to wit:

Pave the gutters, lay flag foot walks, and gravel the roadway of K street from 3rd to 7th streets northwest, according to specifications.

It is further agreed that the work herein specified shall be completed by the fifteenth day of December, 1875, under penalty of forfeiture of all right and title to perform the same. It is further agreed that the said Stephen Talty shall receive the prices established and paid by the board of public works for work of similar character: *Provided*, That payment be made in the bonds issued by the sinking-fund commissioners of the District of Columbia, under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be received and accepted at their par value.

In witness whereof the Commissioners of the District of Columbia, successors to the board of public works, appointed under the act of Congress entitled "An act for the government of the District of Columbia, and for other purposes," approved June 20, 1874, and the party of
11 the second part to these presents, have hereunto set their hands and seals this 3rd day of December, 1875.

W. DENNISON, [L. S.]
J. H. KETCHAM, [L. S.]
S. L. PHELPS, [L. S.]
*Commissioners of the District of Columbia.*

STEPHEN TALTY, [L. S.]
*Contractor.*

Signed and sealed in the presence of—
WM. A. BROWN.
ARTHUR SHEPHERD.

The amount of work done and the materials furnished under the two foregoing extensions of contract 826 by Talty to said District, as certified to by the assistant engineer of the District of Columbia, is as follows:

ACCOUNT UNDER EXTENSIONS OF CONTRACT.

*The District of Columbia to Stephen Talty, Dr., for work done and materials furnished on K street NE., from 3rd to 7th.*

[File No. 1, filed July 2, 1897, Doc. 335, and Lieut. Hoxie's report.]

| | |
|---|---|
| 2,591 cu. yds. ordinary excavation, at 30 cents per cu. yd... | $777. 30 |
| 2,092 cu. yds. 2 feet of old graveled streets, at 40 cents per cu. yd..... | 836. 80 |
| 3,662 cu. yds. earth hauled 350 ft. over 200 ft., at 1¼ cents each 100 feet over 200 feet ..... | 160. 03 |
| 2,824 lineal feet 12 in. gutter flag, at 35 cents pr. ft..... | 938. 43 |
| 993.31 lineal feet 16 in. gutter flag, at 48 cents pr. ft..... | 417. 39 |
| 3,255.61 lineal feet bluestone curbing, 5 in., at $1.20..... | 3, 906. 72 |
| 56.4 lineal feet granite circular curbing, at $2.05 ..... | 115. 62 |
| 25.3 lineal feet bluestone circular curbing, at $2.05 ..... | 51. 86 |
| 3,938.12 square yards sidewalk, at $1 per yd ..... | 3, 938. 12 |

| | | |
|---|---|---|
| 7,522.9 square yards graveled street, at 15 cents per yd.... | | $1,128.43 |
| 1,591 square yards cobblestone, at 70 cents per yd..... | | 1,113.70 |
| | | 13,434.40 |
| Credit by certificates: | | |
| No. 19,360, Dec. 6, 1875..... | $910.00 | |
| No. 19,576, Jan. 14, 1876..... | 5,282.04 | |
| Property, sand, and gravel..... ..... | 359.50 | |
| Property charged, not specified..... | 2,992.05 | |
| | | 9,543.59 |
| Balance due March 18, 1876..... | | 3,890.81 |

March 14, 1876, by law, all work on the streets, &c., in the District was discontinued. (19 Statutes, 211.) March 22, 1876, by circular letter, contractors were notified of said law, and that unfinished contracts were cancelled.

See Report of Commissioners, 1876, page 459.

On May 29, 1876, the said parties entered into a written contract, No. 27, N. S., for the completion of the unfinished work on K street, 3rd to 7th, northeast, as follows, viz:

W. B. No. 27, F—182,–1–E. O., 1876. R. L. H.
Miscellaneous.

This contract, made and concluded this 29th day of May, in the year one thousand eight hundred and seventy-six, by and between the District of Columbia, of the first part, and Stephen Talty, of the second part, witnesseth:

First. That the said party of the second part has agreed, and by
12 these presents does agree, with the said party of the first part, for the consideration hereinafter mentioned and contained, and under the penalty expressed in a bond bearing even date with these presents, and hereunto annexed, to complete the work of setting curbs, laying cobblestone gutters, flag footways, and graveling the carriage way of K street between 3rd and 7th streets, northeast, in the city of Washington, D. C.

Second. It is further agreed that in consideration of this contract the said Stephen Talty will make no claim against the District of Columbia for damages on account of suspension of work, or for other cause, under any order for work, or any contract or agreement between the Commissioners of the District of Columbia and the said Stephen Talty, heretofore existing between said parties and now canceled, except for just settlement for work already completed.

Third. It is further agreed that the said Stephen Talty shall receive for performing the work herein described the prices established and paid the board of public works for work of similar character less a reduction of thirty per cent (30 %), which amount shall be payable in warrants for cash on the United States Treasury; and it is further agreed that the total cost of work under this contract shall not exceed the sum of fifteen hundred and twenty-five dollars and ninety cents ($1,525.90). It is further agreed that the work under this contract shall be completed by July

1st, 1876. If in the opinion of the engineer of the party of the first part said work is at any time unnecessarily delayed, or the contractor is executing the same in bad faith, all of the work may be discontinued under this contract and the party of the first part shall thereupon have power to place other persons to work at and complete the work herein described, and to charge the expense of so completing said work to the said party of the second part, or the said party of the first part may annul and cancel this contract, giving notice in writing of such action through said engineer to the said party of the second part.

Fourth. It is also expressly agreed that this contract shall be subject to the provisions of a certain joint resolution of Congress entitled "Joint resolution directing the Commissioners of the District of Columbia to pay the interest on the bonds issued in pursuance of the act of Congress approved June 20, 1874, out of any funds in the United States Treasury subject to the requisitions of said Commissioners, and for other purposes," approved March 14th, 1876.

In witness whereof the District of Columbia has caused this instrument to be signed by the Commissioners of said District, appointed under the act of Congress entitled "An act for the government of the District of Columbia, and for other purposes," approved June 20, 1874, and the common seal of said District to be hereto affixed, and the party of the second part to these presents has hereunto set his hand and seal the day and year first above written.

W. DENNISON, [L. S.]
J. H. KETCHAM, [L. S.]
S. L. PHELPS, [L. S.]
*Commissioners of the District of Columbia.*

STEPHEN TALTY, [L. S.]
*Contractor.*

Signed and sealed in the presence of—
WM. A. BROWN.

13 The account for work done by claimant under this contract, No. 127, n. s., as per the final measurement, is as follows, viz:

WASHINGTON, D. C., *June 29, 1876.*

*District of Columbia to Stephen Talty, Dr.*

| | | |
|---|---|---|
| 472.23 | square yds. new pavement laid, at 70 cts..... | $330. 56 |
| 608.75 | square yds. cobblestone laid, at 49 cts..... | 298. 34 |
| 11.6 | square yds. old cobble pavement laid, at 25 9/10 . | 3. 00 |
| 1,139.6 | feet flag crossing laid, at 42 ..... | 478. 62 |
| 454 | feet 5-in. B. S. curbing laid, at 84..... | 382. 03 |
| 285.4 | feet 12-in. gutter flag laid, at 24 5/10..... | 69. 92 |
| 215.5 | feet 16-in. gutter flag, at 33 6/10 ..... | 72. 41 |
| 52.2 | feet 12-in. gutter relaid, at 8 4/10..... | 4. 38 |
| 490 | square yards graveling laid, at 10 5/10 ..... | 51. 46 |
| | | 1, 690. 73 |

DUE.

| | |
|---|---|
| For completing brick sidewalk, curbing, flag crossing, and gutters, K, from 3d to 7th, approved by Commissioners May 19, 1876, under contract No. 27... ..... | $1,525.90 |
| Add allowance on brick pavement, approved by Commissioners June 7, 1876..... | 70.00 |
| | 1,595.90 |
| Labor and materials in excess of this ..... | 94.83 |
| Total ..... | 1,690.73 |
| Deduct materials furnished ..... | 152.88 |
| Total for assessments ..... | 1,537.85 |

Received payment, by warrant 37734, of comptroller of D. C.

STEPHEN TALTY.

The account is stated at the rates established and paid by the board of public works before and at the time the extensions of the contract were signed. By the terms of the extensions the claimant was to receive said rates for his work on K street.

The table of rates in force before the extensions were signed is shown by the certificate of the Commissioners of the District of Columbia, in answer to the call of this court, and is dated August 18, 1897, filed August 19, 1897.

The rate paid by the board of public works is proved by the official vouchers, returned to this court in answer to its call, and filed in other cases.

A certified copy of the original official vouchers of payments at board rates to ten other contractors (or 13 vouchers) is filed in this case.

The computation sustains the finding hitherto reported by the referee, viz, that the amount due to the claimant is $4,180.44.

Respectfully submitted.

FRANK W. HACKETT, *Referee.*

APRIL 23D, 1898.

(Indorsed:) D. C. 335. Stephen Talty *vs.* The District of Columbia. Additional report of referee. Filed Apr. 23, 1898. Court of Claims. Clerk pl. file. Frank W. Hackett, referee.

14 V.—*Defendant's exceptions to report of referee.*—Filed October 17, 1898.

EXCEPTIONS TO THE REPORT OF F. W. HACKETT, ESQ., REFEREE.

Now comes the defendant, the District of Columbia, and excepts to the report of F. W. Hackett, referee, filed herein April 23, 1898, and for causes of exceptions assigns the following:

I. The referee erred in treating the "paper filed July 2, 1897, marked number one in red ink," as a final measurement of the work referred to in said paper.

II. The referee erred in stating the account between the claimant and the District of Columbia, as being contained in the above-mentioned paper, the same not even purporting to be the account between the parties.

III. The referee erred in stating the account between the parties, there being no competent testimony to support the same.

IV. The referee erred in stating the account according to the entries from the ledger of the District of Columbia, the entries upon said ledger showing affirmatively that the account was not stated.

V. The referee erred in rejecting the evidence of the statements of the accounts by the former referee, those statements being the best evidence obtainable of the condition of the accounts between the claimant and the District. This, in view of the admitted fact that the original petition and report of the referee, Donovan, and testimony shown by the docket entries to have been introduced, have been lost.

ROBERT A. HOWARD,
*U. S. Special Attorney.*

Overruled by the court.

CHARLES C. NOTT,
*Chief Justice.*

15 VI.—*Judgment of the court.*

STEPHEN TALTY
*vs.*
THE DISTRICT OF COLUMBIA. } No. 335, D. C.

At a Court of Claims held in the city of Washington on the 20th day of February, A. D. 1899, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said claimant, Stephen Talty, have and recover in the manner provided by the act of June 16, 1880, chapter 243, the sum of four thousand one hundred and eighty dollars and forty-four cents ($4,180\frac{44}{100}$) against the defendant upon debts of the District of Columbia, due and payable on the 18th day of March, 1876.

BY THE COURT.

16 III.—*Defendant's motion for a new trial.*—Filed March 15, 1899.

MOTION FOR A NEW TRIAL.

Now comes the defendant, The District of Columbia, and moves the court to vacate the judgment heretofore rendered in this case on February 20, 1899, and to grant a new trial herein, and for reasons therefor assigns the following:

I. The reports of the referee, dated October 19, 1897, and April 23, 1898, adopted by the court as its findings of fact, do not refer to and return to the court all the testimony presented to said referee, in this: That said reports do not include the memorandum report and letter of Daniel Donovan, returned by the Commissioners of the District of Columbia on April 19, 1898, in answer to a rule of the Court of Claims

of April 8, 1898, which paper is included in a supplemental report of the referee dated October 12, 1898.

II. The court, in adopting the reports of the referee as its findings of fact, failed to pass upon the exceptions entered by the defendant, District of Columbia.

III. The court erred in adopting as a finding of fact the account stated by the referee in his report, dated April 23, 1898, the said account being for "board rates," instead of the rates provided for and properly under the contract No. 826.

IV. That the court erred in adopting as a finding of fact the report of the referee that the claimant was entitled to recover, under the extensions of contract No. 826, the "rates" established by the board of public works after the date of said contract No. 826; or any increased rates over those stated in or allowable under said contract No. 826.

V. That the court erred in separating the account for work done under the *extensions* of contract No. 826 and the work done under the *original* contract No. 826, because, to make a fair and proper settlement, all the work done under the original contract and its extensions should have been made the subject of the account.

VI. That the court erred in this; the original petition having been lost and no substitution therefor having been made, nor any evidence offered or introduced as to its contents, the amended petition filed could not be considered by the court, and no valid judgment could be given thereon.

17 VII. The reports of the referee, adopted by the court as its findings of facts, are contrary to the evidence. The following evidence was introduced by the defendant:

"DEPARTMENT OF JUSTICE,
"*Washington, D. C., November 11, 1890.*

"Mr. DANIEL DONOVAN,
"*Washington, D. C.*

"SIR: You are hereby employed to assist the counsel of the United States in the investigation of the claims set forth in the suit of M. J. Laughlin *v.* The District of Columbia, and certain other suits of that class pending in the Court of Claims, and in obtaining evidence for the defense thereof.

"Your compensation will be at the rate of $10 per day for each full day's service, payable from the appropriation for 'Defending suits against the District of Columbia.'

"Very respectfully,
(Signed) W. H. H. MILLER,
"*Attorney-General.*"

(This paper was not before the referee.)

And to a call of the Court of Claims the Commissioners made the following response:

"OFFICE OF THE COMMISSIONERS
"DISTRICT OF COLUMBIA,
"*Washington, April 19, 1898.*

"STEPHEN TALTY
*v.*
"DISTRICT OF COLUMBIA. } No. 335.

"To JOHN RANDOLPH, Esq.,
*Assistant Clerk Court of Claims of United States.*

"SIR: For answer to the rule issued in the above-entitled cause,
18 transmitted with your letter of April 8, the Commissioners of the District of Columbia return herewith the following certificates, measurements, or other evidences of indebtedness, to wit:

"Copy of a memorandum report made by the referee, Daniel Donovan, in the above cause. Voucher No. 19360 of 1875.

"Very respectfully,
(Signed) "WILLIAM TINDALL, *Secretary.*"

"WASHINGTON, D. C., *June 25, 1891.*

"FELIX BRANNIGAN, Esq.,
"*Assistant Attorney, Department of Justice.*

"SIR: In compliance with your request and verbal instructions, and under my appointment by the Attorney-General of the United States of November 11, 1890, I have made a careful, thorough, and searching investigation of all records, vouchers, and other papers pertaining to every of the cases relating to the District of Columbia now pending in the United States Court of Claims under the act of June 16, 1880, and beg to submit the following report as the result of such research:

* * * * * * *

"STEPHEN TALTY
*v.*
"THE DISTRICT OF COLUMBIA. } No. 335. Referred list (p. 36).

"This case involved the examination and stating of accounts under seven separate and distinct contracts. It was referred to me as referee, by the Court of Claims, and was reported under a rule of said court, heretofore referred to in Murray's case, No. 90.

19 "Said report shows that claimant is entitled to recover from the defendant under his several contracts the sum of ..... $1,814.79

"It further shows that claimant is indebted to defendant, by reason of overpayment by the board of audit, in the amount of ..... 989.71

"Thus leaving a net balance due claimant ..... 825.08

"Attached to said report and forming part thereof is the following set-off:

| | |
|---|---|
| "File No. 22, 61.5 square yards of cobblestone pavement relaid, allowed at 37 cents per yard in lieu of 30 cents, the the contract rate. Excess 7 cents per yard on 61.5 yards. | $4.30 |
| "8,237.98 cubic yards grading, allowed at 40 cents per yard in lieu of 30 cents, the contract rate. Excess 10 cents per yard on 8,237.98 yards..... | 823.79 |
| "784.20 cubic yards rock excavation, allowed at $1 per yard in lieu of 30 cents per yard, the contract rate. Excess 70 cents per yard on 784.20 yards..... | 548.94 |
| "Total ..... | 1,377.03 |

"A more thorough and exhaustive examination of the records which constitute my former report in this case convinces me that the counter-claim therein reported is both erroneous and unjust, for the reason that M street northwest, wherein the alleged excessive allowances were made claimant, was in fact, at the time he did the work, an old graveled street, and also that rock was encountered in part of it. It also appears that nearly the whole of the work was done under the Commissioners of the District of Columbia, and that the prices certified by the engineer and paid Talty were what are commonly known as 'board rates,' and that said allowances were not made under any mistake of fact, but that they were the prices universally paid to other contractors doing similar work at the time.

"I am therefore of the opinion that my former report should be amended by striking out the set-off therein stated, and finding a balance due Talty of $825.08, with interest from March 1, 1876.

"All of which is respectfully submitted.

(Signed) "DAN. DONOVAN.

"Correct copy.

"A. MCKENZIE,

"*Actg. Auditor, District of Columbia.*"

And said evidence was not considered by the referee in making his account, adopted by the court as the findings of fact.

VIII. That since the reports of the referee, Hackett, and the exceptions thereto, the following paper has been discovered in the files of another case, and the defendant deems it material to the settlement of the issues between the claimant and the District of Columbia, and therefore prays he may have leave to introduce the same as newly discovered evidence; for, taken in connection with the docket entries in the case (a copy of which is hereto annexed), and the memorandum report of the referee, D. Donovan, it is apparent the amended petition is not authorized as a substitute for the original petition.

"Received the original vouchers in the above-entitled causes this April 26, 1881. Eleven vouchers in Roche cause, and reply of Commissioners, and three vouchers in No. 82, and twenty-three vouchers in No. 335. Stephen Talty.

"I. S. LYON,

"*For Department of Justice.*"

(Written across the face:) Returned May 4, 1881. J. R.

IX. And defendant asks leave to have a rehearing upon the said cause, and for permission to file his requests for findings of fact on this date presented to the court.

ROBERT A. HOWARD,
*United States Special Attorney.*

Overruled by the court.

CHARLES C. NOTT,
*Chief Justice.*

JANUARY 8, 1900.

21 In the Court of Claims.

STEPHEN TALTY
*vs.*
THE DISTRICT OF COLUMBIA. } No. 335, D. C.

VIII.—*Request for findings of fact by defendant.*—Filed March 15, 1889.

The defendant, considering the facts hereinafter set forth to be proven, and deeming them material to the due presentation of this case in the finding of facts, requests the court to find the same, as follows:

I. The claimant had written contracts with the District of Columbia for the improvement of the streets of Washington, under the act of February 21, 1871.

II. The claimant brought suit under the act of June 16, 1880, to recover balances alleged to be due upon seven of these contracts, namely: Nos. 140, 199, 242, 283, 903, 966, 826, and two extensions of contract No. 826 made by claimant with the Commissioners of the District of Columbia. (Docket entries hereto attached, and memorandum report of Dan Donovan, referee, returned by Commissioners under date of April 19, 1898, attached to supplemental report of referee.)

III. That by order of the court, on November 6, 1882, the case was referred to Daniel Donovan to state an account; that said referee made a report on May 19, 1885; that said case was again referred to
22 said Donovan on March 31, 1886; that all the papers on file up to that time, including the original petition, contracts (excepting contract No. 826 and the two extensions thereof), vouchers, report of referee, have been lost. (Docket entries and report of Hackett, referee.)

IV. That Donovan died without having made a report under the second reference, and on June 22, 1897, the case was referred to F. W. Hackett, esq., to state an account; that, pending that reference, on July 28, 1897, by leave of the court, the amended petition herein was filed; that, afterwards, viz, on October 19, 1897, and April 23, 1898, and October 12, 1898, reports were filed by the referee, Hackett; that these reports included accounts upon only the contract No. 826 and its two extensions. (Docket entries, amended petition, and reports of referee.)

V. That contract No. 826 and its extensions are as follows:

This contract, made and concluded this seventh day of August, in the year one thousand eight hundred and seventy-three (1873), by and between Henry D. Cooke, Alexander R. Shepherd, James A. Magruder, Adolph Cluss, and Henry S. Willard, constituting and composing the board of public works of the District of Columbia, of the first part, and Stephen Talty, of Washington, D. C., of the second part.

Witnesseth:

First. That the said party of the second part has agreed, and by these presents doth agree, with the said party of the first part, for the consideration hereinafter mentioned and contained, and under the penalty expressed in a bond bearing even date with these presents, and hereunto annexed, to furnish at his own proper cost and expense all the necessary materials and labor, and, in a good, firm, and substantial manner, to grade, set the curbstone, lay, and put down cobblestone pavement in gutters, and lay and put down the brick foot pavement on M street NE., between North Capitol and Boundary streets, NE., in the city of Washington, D. C.

23

Also, to gravel the carriage way of said M street NE., between said North Capitol and Boundary streets NE., in the city of Washington, D. C.

The work of said grading, curbing, brick paving, and gravelling to be done and completed in accordance with the specifications, to wit:

Tenth. It is further agreed that the said party of the second part shall receive the following prices as full compensation for furnishing all the materials and labor which may be required in the prosecution of the whole of the work to be done under this agreement, and in all respects completing the same, to wit:

Grading, thirty (30) cents for each and every cubic yard of earth, sand, or gravel excavated and hauled a distance not exceeding two hundred (200) feet, and one and one-quarter (1¼) cents per cubic yard for every additional one hundred (100) feet of haul beyond the first two hundred (200) feet.

Gravelling, per square yard, fifteen (15) cents;

Laying brick foot pavement (new), per square yard, one hundred (100) cents;

Relaying brick foot pavement (old), per square yard, twenty-five (25) cents;

24

Setting curbstones, 8 in. (new), per lineal foot, forty (40) cents.

Setting curbstones, six in. (new), per lineal foot, thirty (30) cents.

Setting curbstones, 5 in. (new), per lineal foot, twenty-five cents (25) cents.

Resetting curbstones, 4 in. (old), per lineal foot, fifteen (15) cents.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

HENRY D. COOK, [L. S.]
ALEX. R. SHEPHERD, [L. S.]
JAMES A. MAGRUDER, [L. S.]
ADOLPH CLUSS, [L. S.]
H. A. WILLARD, [L. S.]
*Board of Public Works of the District of Columbia.*

STEPHEN TALTY, [L. S.]
*Contractor.*

Signed and sealed in the presence of—
W. E. NOTT.
GEO. T. HOWARD.
JOHN A. HURLEY.

Extension of contract No. 826:

For and in consideration of the stipulations hereinafter contained, it is agreed by and between the Commissioners of the District of Columbia and Stephen Talty, that contract No. 826, in the series of contracts made by the Board of Public Works of the District of Columbia, be, and the same is hereby, extended, with its various terms, conditions, and stipulations, to embrace the following work, to wit:

Set the curbs and lay the brick foot walks on K street North, from 3d to 7th street East—all old material suitable for the purpose to be relaid. Also do the necessary grading on said street between said points.

It is further agreed that the work herein specified shall be com-
25 pleted by the first of November, 1875, under penalty of forfeiture of all right and title to perform said work.

It is further agreed that the said Stephen Talty shall receive the prices established and paid by the Board of Public Works for work of similar character, provided that payment be made in the bonds issued by the Sinking Fund Commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress approved June 7, 1874, which bonds shall be accepted and received at their par value.

In witness whereof the Commissioners of the District of Columbia, successors to the late Board of Public Works, appointed under the act of Congress entitled "An act for the government of the District of Columbia, and for other purposes," approved June 20, 1874, and the parties of the second part to these presents have hereunto set their hands and seals this 17th day of September, 1875.

W. DENNISON, [L. S.]
J. H. KETCHAM, [L. S.]
S. L. PHELPS, [L. S.]
*Commissioners of the District of Columbia.*

STEPHEN TALTY, [L. S.]
*Contractor.*

Signed and sealed in the presence of—
WM. A. BROWN.

File No. 2, filed August 19, 1897, Doc. No. 335, is the second extension of contract 826, and is in the language and figures to wit:

December 3d, 1875, File 10097, E. O., 1875.

Extension of contract No. 826.

For and in consideration of the stipulations hereinafter contained, it is agreed by and between the Commissioners of the District of Columbia and Stephen Talty, that contract No. 826, in the series of
26 contracts made by the Board of Public Works of the District of Columbia, be, and is hereby, extended, with its various terms, conditions, and stipulations, to include the following work, to wit:

Pave the gutters, lay flag foot walks, and gravel the roadway of K street from 3d to 7th streets Northwest, according to specifications.

It is further agreed that the work herein specified shall be completed by the fifteenth day of December, 1875, under penalty of forfeiture of all right and title to perform the same.

It is further agreed that the said Stephen Talty shall receive the prices established and paid by the Board of Public Works for work of

similar character, provided that payment be made in the bonds issued by the Sinking Fund Commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be received and accepted at their par value.

In witness whereof the Commissioners of the District of Columbia, successors to the Board of Public Works, appointed under the act of Congress entitled "An act for the government of the District of Columbia, and for other purposes," approved June 20, 1874, and the party of the second part to these presents have hereunto set their hands and seals this 3d day of December, 1875.

W. DENNISON, [L. S.]
J. H. KETCHAM, [L. S.]
S. L. PHELPS, [L. S.]
*Commissioners of the District of Columbia.*

STEPHEN TALTY, [L. S.]
*Contractor.*

Signed and sealed in the presence of—
WM. A. BROWN,
ARTHUR SHEPHERD.

27 VI. The referee, Donovan, reported to the court on May 19, 1885, that—

| | |
|---|---|
| Claimant is entitled to recover from the defendant, under his several contracts, the sum of | $1,814.79 |
| That claimant is indebted to defendant, by reason of overpayment by the board of audit | 989.71 |
| Thus leaving a net balance due claimant of | 825.08 |

Attached to said report and forming part thereof is the following set-off:

| | |
|---|---|
| File No. 22: 61.5 square yards cobblestone pavement relaid, allowed at 37 cents per yard, in lieu of 30 cents, the contract rate. Excess, 7 cents per yard, on 61.5 yards | $4.30 |
| 8,237.98 cubic yards grading, allowed at 40 cents per yard, in lieu of 30 cents, contract rate. Excess, 10 cents per yard, on 8,237.98 yds | 823.79 |
| 784.20 cubic yards rock excavation, allowed at $1 per yard, in lieu of 30 cents per yard, the contract rate. Excess, 70 cents per yard, on 784.20 yds | 584.94 |
| Total | 1,377.03 |

That this excess of payments was made for work done under contract No. 826, and was made by allowing for work at "board rates," instead of contract rates. (Memorandum report of Dan Donovan, referee, returned by Commissioners under date of April 19, 1898, and attached to supplemental report of Referee Hackett.)

VII. That the greater part of the settlements made under contract No. 826, and all the settlements under the extensions of said contract, were made at "board rates," and not at the rates fixed in contract 826.

(Referee Hackett's report; memorandum report of Donovan
28 above referred to; contract No. 27 and account thereunder in Referee Hackett's "Additional report;" Hoxie's report, Commissioners D. C.; Report H. R. 44th Congress, 1st sess., Ex. Doc. 1, part 7, pp. 247, 371.)

VIII. That upon the whole case the claimant is indebted to the District of Columbia in the sum of $551.95.

ROBERT A. HOWARD,
*United States Special Attorney.*

29 IX—*Motion to reform judgment in the above case and for ruling upon requests for findings of fact.*

Now comes the defendant by the Attorney-General and moves the court to reform judgment rendered in this case on the 20th day of February, 1899, and made final by the judgment overruling the defendant's motion for a new trial on the 8th day of January, 1900, by showing that the cause came on to be heard on the reports of the referee and exceptions to the report of the referee filed April 23, 1898, and that the exceptions to said report were overruled.

The record shows that the exceptions were overruled at the time of the overruling of the motion for new trial, which counsel deems an error and which he assigned for error in the motion for a new trial. And defendant further asks the court for a finding upon each of the requests for finding of fact filed March 15, 1899, the record not disclosing any action of the court thereon.

L. A. PRADT,
*Assistant Attorney-General.*

Filed January 25, 1900.

*Order of the court.*

The motion of the defendant for new trial is hereby overruled and the old findings set aside and new findings this day filed, and the request of defendant for findings disallowed.

BY THE COURT.

Filed February 26, 1900.

30 STEPHEN TALTY
*v.*
DISTRICT OF COLUMBIA. } No. 335.

X.—*Findings of fact and conclusion of law*—Filed February 26, 1900.

This case having been heard by the court upon the evidence, the facts are found as follows:

I.

The claimant and defendant entered into the following contract, to wit:

Contract 826 is in the following language and figures, to wit:

This contract, made and concluded this seventh day of August, in the year one thousand eight hundred and seventy-three (1873), by and

between Henry D. Cooke, Alexander R. Shepherd, James A. McGruder, Adolph Cluss, and Henry S. Willard, constituting and composing the board of public works of the District of Columbia, of the first part, and Stephen Talty, of Washington, D. C., of the second part, witnesseth:

First. That the said party of the second part has agreed, and by these presents doth agree with the said party of the first part, for the consideration hereinafter mentioned and contained, and under a penalty expressed in a bond bearing even date with these presents, and hereunto annexed, to furnish at his own proper cost and expense all the necessary materials and labor and, in a good, firm, and substantial manner, to grade, set the curbstones, lay and put down cobblestone pavement in gutters, and lay and put down the brick foot pavement on M street NE., between North Capitol and Boundary streets NE., in the city of Washington, D. C.

Also, to gravel the carriage way of said M street NE., between said North Capitol and Boundary streets NE., in the city of Washington, D. C.

The work of said grading, curbing, brick paving, and graveling to be done and completed in accordance with the specifications, to wit:

Tenth. It is further agreed that the said party of the second part shall receive the following prices as full compensation for furnishing all the materials and labor which may be required in the prosecution of the whole of the work to be done under this agreement, and in all respects completing the same, to wit:

Grading, thirty (30) cents for each and every cubic yard of earth, sand, or gravel excavated and hauled a distance not exceeding two hundred (200) feet, and one and one-quarter (1¼) cents per cubic yard for every additional one hundred (100) feet of haul beyond the first two hundred (200) feet.

Graveling, per square yard, fifteen (15) cents.

Laying brick foot pavement (new), per square yard, one hundred (100) cents.

31 Relaying brick foot pavement (old), per square yard, twenty-five (25) cents.

Setting curbstones, 8 in., new, per lineal foot, forty (40) cents.

Setting curbstones, 6 in., new, per lineal foot, thirty (30) cents.

Setting curbstones, 5 in., new, per lineal foot, twenty-five (25) cents.

Resetting curbstones, 4 in., old, per lineal foot, fifteen (15) cents.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

HENRY D. COOK, [L. S.]
ALEX. R. SHEPHERD, [L. S.]
JAMES A. McGRUDER, [L. S.]
ADOLPH CLUSS, [L. S.]
H. A. WILLARD, [L. S.]
*Board of Public Works of the District of Columbia.*

STEPHEN TALTY, [L. S.]
*Contractor.*

And thereafter the said contract was extended, as follows:

Extension of contract No. 826.

For and in consideration of the stipulation hereinafter contained, it is agreed by and between the Commissioners of the District of Columbia

and Stephen Talty that contract No. 826, in the series of contracts made by the board of public works of the District of Columbia, be, and is hereby, extended with its various terms, conditions, and stipulations to embrace the following work, to wit:

Set the curbs and lay the brick foot walks on K street north from 3rd to 7th street east, all old material suitable for the purpose to be relaid. Also do the necessary grading on said street between said points.

It is further agreed that the work herein specified shall be completed by the first of November, 1875, under penalty of forfeiture of all right and title to perform said work.

It is further agreed that the said Stephen Talty shall receive the prices established and paid by the board of public works for work of similar character: Provided, That payment be made in the bonds issued by the sinking fund commissioners of the District of Columbia under and by virtue of section of the act of Congress approved June 7, 1874, which bonds shall be accepted and received at their par value.

In witness whereof the Commissioners of the District of Columbia, successors to the late board of public works, appointed under the act of Congress entitled "An act for the government of the District of Columbia, and for other purposes," approved June 20, 1874, and the parties of the second part to these presents, have hereunto set their hands and seals this 17th day of September, 1875.

W. DENNISON, [L. S.]
J. H. KETCHAM, [L. S.]
S. L. PHELPS, [L. S.]
*Commissioners of the District of Columbia.*

STEPHEN TALTY, [L. S.]
*Contractor.*

Signed and sealed in the presence of—
WM. A. BROWN.

Extension contract No. 826.

For and in consideration of the stipulations hereinafter contained, it is agreed by and between the Commissioners of the District of Columbia and Stephen Talty that contract No. 826, in the series of contracts made by the board of public works of the District of Columbia, be, and is hereby, extended, with its various terms, conditions, and stipulations, to include the following work, to wit:

Pave the gutters, lay flag foot walks, and gravel the roadway of K street from 3rd to 7th streets northwest, according to specifications.

It is further agreed that the work herein specified shall be completed by the fifteenth day of December, 1875, under penalty of forfeiture of all right and title to perform the same. It is further agreed that the said Stephen Talty shall receive the prices established and paid by the board of public works for work of similar character: Provided, That payment be made in the bonds issued by the sinking-fund commissioners of the District of Columbia, under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be received and accepted at their par value.

32 In witness whereof the Commissioners of the District of Columbia, successors to the board of public works, appointed under the act of Congress entitled "An act for the government of the

District of Columbia, and for other purposes," approved June 20, 1874, and the party of the second part to these presents, have hereunto set their hands and seals this 3rd day of December, 1875.

W. DENNISON, [L. S.]
J. H. KETCHAM, [L. S.]
S. L. PHELPS, [L. S.]
*Commissioners of the District of Columbia.*

STEPHEN TALTY, [L. S.]
*Contractor.*

Signed and sealed in the presence of—
WM. A. BROWN.
ARTHUR SHEPHERD.

The account under contract 826, stated at contract price, is as follows:

*The District of Columbia to Stephen Talty, Dr., for work done and materials furnished on M street NE.*

| | | |
|---|---|---|
| Lowering water main | | $1,100.00 |
| Surface work | | 48,223.54 |
| | | 49,323.54 |
| Credit by certificates | $44,345.51 | |
| Credit by property | 4,688.40 | |
| | | 49,033.91 |
| Balance due January 15, 1876 | | 289.63 |

II.

Account under extensions of contract for work done at prices established and paid by the board of public works is as follows:

*The District of Columbia to Stephen Talty, Dr., for work done and materials furnished on K street NE., from 3rd to 7th.*

| | |
|---|---|
| 2,591 cu. yds., ordinary excavation, at 30 cents per cu. yd | $777.30 |
| 2,092 cu. yds. 2 feet of old graveled streets, at 40 cents per cu. yd | 836.80 |
| 3,662 cu. yds. earth hauled 350 ft. over 200 ft., at 1¼ cents each 100 feet over 200 feet | 160.03 |
| 2,824 lineal feet 12 in. gutter flag, at 35 cents pr. ft | 938.43 |
| 993.31 lineal feet 16 in. gutter flag, at 48 cents pr. ft | 417.39 |
| 3,255.61 lineal feet bluestone curbing, 5 in., at $1.20 | 3,906.72 |
| 56.4 lineal feet granite circular curbing, at $2.05 | 115.62 |
| 25.3 lineal feet bluestone circular curbing, at $2.05 | 51.86 |
| 3,938.12 square yards sidewalk, at $1 yer yd | 3,938.12 |
| 7,522.9 square yards graveled street, at 15 cents per yd | 1,128.43 |
| 1,591 square yards cobblestone, at 70 cents per yd | 1,113.70 |
| | 13,434.40 |

| | | |
|---|---|---|
| Credit by certificates: | | |
| No. 19360, Dec. 6, 1875 | $910.00 | |
| No. 19576, Jan. 14, 1876 | 5,282.04 | |
| Property, sand and gravel | 359.50 | |
| Property charged, not specified | 2,992.05 | |
| | | 9,543.59 |
| Balance due March 18, 1876 | | 3,890.81 |

33 III.

It does not appear that the defendants objected to the quality of the work either at the time of its completion or at any time thereafter.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides that the claimant is entitled to recover a judgment against the defendant for the sum of four thousand one hundred and eighty dollars and forty-four cents ($4,180.44).

BY THE COURT.

JUDGMENT.

At a Court of Claims held in the city of Washington on the 26th day of February, 1900, judgment was entered as follows:

The court on due consideration of the premises find in favor of the claimant, and do order, adjudge, and decree that the said claimant, Stephen Talty, have and recover in the manner provided by the act of June 16, 1880, Chapter 243, the sum of four thousand one hundred and eighty dollars and forty-four cents ($4,180.44-100) against the defendant upon debts of the District of Columbia, due and payable on the 18th day of March, 1876.

BY THE COURT.

34 XI.—*Exceptions of defendant to refusal of court to make findings of facts.*—Filed March 1, 1900.

Now comes defendant, The District of Columbia, by the Attorney-General of the United States, and presents the following exceptions to the refusal of the court to make findings of fact as prayed by defendant, in requests filed on January 25, 1900.

1. The defendant excepts to the refusal of the court to find as requested in its second request as follows:

"11. The claimant brought suit under the act of June 16, 1880, to recover balances alleged to be due upon seven of these contracts, namely, Nos. 140, 199, 242, 283, 903, 966, 826; and two extensions of contract No. 826, made by claimant with the Commissioner' of the District of Columbia. (Docket entries hereto attached; and memorandum report of Dan. Donovan, referee, returned by Commissioners under date of April 19, 1898, attached to the supplemental report of referee.)"

2. The defendant excepts to the refusal of the court to find as requested in the third request as follows:

"111. That by order of the court, on November 6, 1882, the case was referred to Daniel Donovan to state an account; that said referee made a report on May 19, 1885; that said case was again referred to said Donovan on March 31, 1886; that all papers on file up to that
35 time, including the original petition, contracts (excepting contract No. 826 and the two extensions thereof), vouchers, report of referee, have been lost. (Docket enteries and report of Hackett, referee.)"

3. The defendant excepts to the refusal of the court to find as requested in the fourth request, as follows:

"IV. That Donovan died without making a report under the second reference, and on June 22, 1897, the case was referred to F. W. Hackett, esq., to state an account; that pending that reference, on July 28, 1897, by leave of the court, the amended petition herein was filed; that afterwards, viz, on October 19, 1897, and April 23, 1898, and October 12, 1898, reports were filed by the referee, Hackett; that these reports included accounts upon only the contract No. 826, and its two extensions. (Docket entries, amended petition, and reports of referees.)"

4. The defendant excepts to the refusal of the court to find as requested in the sixth request as follows:

"VI. The referee, Donovan, reported to the court, on May 19, 1885, that—

| | |
|---|---|
| "Claimant is entitled to recover from the defendant, under his several contracts, the sum of | $1,814.79 |
| "That claimant is indebted to defendant, by reason of overpayment by the board of audit | 989.71 |
| "Thus leaving a net balance due claimant of | 825.08 |

"Attached to said report and forming a part thereof is the following set-off:

| | |
|---|---|
| "File No. 22. 61.5 square yards cobblestone pavement relaid, allowed at 37 cents per yard in lieu of 30 cents, contract rate. Excess, 7 cents per yard on 61.5 yards | $4.30 |
| 36 "8,237.98 cubic yards grading, allowed at 40 cents per yard in lieu of 30 cents, contract rate. Excess, 10 cents per yard, on 8,237.98 yds | 823.79 |
| "784.20 cubic yards rock excavation, allowed at $1 per yard in lieu of 30 cents per yard, the contract rate. Excess, 70 cents per yard, on 784.20 yards | 548.94 |
| "Total | $1,377.03 |

That this excess of payments was made for work done under contract No. 826, and was made by allowing for work at "board rates" instead of contract rates.

(Memorandum report of Dan Donovan, referee, returned by Commissioners, under date of April 19, 1898, and attached to supplemental report of Referee Hackett.)

5. The defendant excepts to the refusal of the court to find as requested in the seventh request as follows:

"VII. That the greater part of the settlements made under contract No. 826, and all the settlements under the extensions of said contract were made at "board rates" and not at the rates fixed in contract 826. (Referee Hackett's report; memorandum report of Donovan above referred to; contract No. 27, and account thereunder in Referee Hackett's 'Additional report;' Hoxie's report Commissioners D. C., report H. R."

L. A. PRADT,
*Assistant Attorney-General.*

ROBERT A. HOWARD,
*Special Asst. Attorney.*

37 *Ruling of the court on the foregoing requests of defendant.*

Finding VII, above set forth, is refused, except as more fully set forth in the findings of the court, I and II.

Findings II, III, IV, and VI, above set forth, are refused on the ground that the same refer to matters of record in the case and not to facts established by evidence.

BY THE COURT.

38 XII.—*Application for and allowance of appeal.*

STEPHEN TALTY,
*vs.*
DISTRICT OF COLUMBIA. } No. 335. D. C.

Now comes the defendant, The District of Columbia, by the Attorney-General of the United States, and prays the court for allowance of an appeal from the judgment entered herein on the 26th day of February, 1899, in favor of the claimant, to the Supreme Court of the United States.

L. A. PRADT,
*Assistant Attorney-General.*

ROBERT A. HOWARD,
*Special Assistant Attorney.*

Filed March 1, 1900, in open court.

Ordered that the foregoing application of Assistant Attorney-General Pradt, for appeal, be allowed as prayed for.

BY THE COURT.

March 1, 1900.

39 Court of Claims.

STEPHEN TALTY,
*vs.*
DISTRICT OF COLUMBIA. } No. 335.

I, John Randolph, hereby certify that the foregoing are true transcripts of pleadings in the above-entitled cause, of the findings of fact and con-

clusion of law, of the judgment of the court, of motions for new trial and orders overruling same, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof, I hereunto set my hand and affix the seal of said Court of Claims this 29th day of March, A. D. 1900.

[SEAL.] JOHN RANDOLPH,
*Asst. Clerk Court of Claims.*

(Indorsement on cover:) File No. 17,699, Court of Claims. Term No. 238. The District of Columbia, appellant, vs. Stephen Talty. Filed March 30, 1900.

○

Office Supreme Court U.S.
FILED
APR 17 1901
JAMES H. McKENNEY,
Clerk.

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1900.

## No. 238.

## THE DISTRICT OF COLUMBIA, APPELLANT, v. STEPHEN TALTY.



RETURN TO WRIT OF CERTIORARI.

In the Court of Claims.

STEPHEN TALTY
*v.*
THE DISTRICT OF COLUMBIA. } No. 335 D. C. Filed March 1, 1900.

*Motion for allowance of appeal.*

Now comes the defendant, The District of Columbia, by the Attorney-General of the United States, and prays the court for allowance of an appeal from the judgment entered hereon on the ~~26th~~ day of ~~February, 1900,~~ in favor of claimant.

L. A. PRADT,
*Assistant Attorney-General.*

ROBERT A. HOWARD,
*Special Assistant Attorney.*

COURT OF CLAIMS,
*Washington, D. C., April 15, 1901.*

I, John Randolph, asst. clerk, Court of Claims, certify that the foregoing is a true copy of the defendant's motion for allowance of appeal in the above case, as it now appears to me this 15th day of April, 1901, with the number "26th" and the word "February" and the number "1900" erased.

Test this 15th day of April, 1901.

[SEAL.]

JOHN RANDOLPH,
*Asst. Clerk, Court of Claims.*

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